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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC., Petitioners,

v.

JANE DOE, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

For the reasons set out in the Argument, the Court does not have jurisdiction to review the non-final order of the New York

Court of Appeals.

QUESTIONS PRESENTED

1. Does a doctor (psychiatrist) have the constitutional right to publish a patient's confidential communications to the doctor, despite the patient's objection to the publication, and despite a statute and regulation prohibiting the unauthorized disclosure by a physician of such information?

2. Does the Supreme Court have jurisdiction to review the order of a state court affirming an interlocutory injunction when the interlocutory order does not terminate the litigation between the parties, and there are (as Petitioners maintain) contested issues of fact and "unsettled questions of state law" still to be determined by the

trial court?

STATEMENT OF THE CASE

Petitioner Joan Roe is a psychiatrist (and is referred to hereafter as "the Psychiatrist"). The Respondent is a former patient of the Psychiatrist (and is referred to hereafter as "the Patient"). The Patient's privileged communications to the Psychiatrist were published by the Psychiatrist in a commercial book entitled "In Search of a Response" (referred to hereafter as "the book"). The book is exclusively about the Patient and her former husband, now deceased, and their son. It contains their most intimate revelations to the Psychiatrist during the seven years that the Psychiatrist treated them in psychotherapy.

The nature of the information confided to the Psychiatrist and published in the book, may be gathered from the following passage:

> "I wanted to sleep with him [her husband], he said he was very tired. I was very aroused. He tried - he got soft. Then we tried again. For a while I couldn't stand it, 'Either you sleep with me right now or I can't stand it, I won't work on it, either yes or no. Even if I don't get aroused immediately I am ready to go.' He then entered me, but he was tense and had difficulty controlling himself. I said, 'Don't worry, this is better than nothing.' ....
>
> "Henry finished but I didn't. He banged on the bed, ran to the window and looked out. I felt my vagina, it was very hot and very wet - I said, 'I am alive again.'
>
> "Henry went to sleep and I masturbated..."

Although the Patient, her husband and their child are given fictitious names

in the book, the circumstances of their lives are so unusual that the Patient and her family are identifiable.

The Psychiatrist contends, and the Patient denies, that the Patient, while under therapy, gave oral consent to the publication of the book. Both agree that the Psychiatrist requested, and the Patient refused, to give written consent. As one of the courts below indicated, if oral consent was given it would have been virtually meaningless, for there was little likelihood of informed, voluntary agreement at that time, in view of the Patient's emotional dependency upon the Psychiatrist during therapeutic treatment, and the submissive attitude induced by the treatment.

The Psychiatrist, to discourage further investigation of her publication of the

Patient's confidential communications, wrote to an attorney for the Patient suggesting that the reports that the Psychiatrist was publishing a book were merely "rumors" and that the Patient was mistaken in assuming that a book by the Psychiatrist would be about her. At the time the Psychiatrist's letter was written, the book was being printed. The Psychiatrist later admitted that the book was in fact about the Patient and her family, and only about them. The Patient did not learn of the publication of the book until it was on sale in department stores and other sales outlets, some time after the Psychiatrist's letter was received.

The Patient teaches at a university and is the mother of two children. She would suffer grievous harm if further disclosure of the secrets she confided to the Psychiatrist is allowed. The most intimate details of the

Patient's experiences with her husband, and her innermost thoughts and emotions, would be exposed to all who read the book. The statements in the book allegedly made by the Patient's husband are certain to humiliate the Patient. He is quoted in the book as having expressed the wish to murder the Patient, and he is said to have confessed homosexuality, involvement with prostitutes, and masturbation.

The Psychiatrist maintains, at pp. 2 and 3 of the Petition for Certiorari, that the book is "of great scientific and medical interest and importance". But the advertisements for the supposed scientific treatise, in newspapers and magazines of wide circulation, described the book as a "Symphony of Feeling", as a "sheer pleasure" and an "intense

experience" (A5-6).[1]

The Patient brought action in the Supreme Court of New York to enjoin further distribution and advertising of the book and to recover damages arising from the disclosure of the privileged communications. The Court of first instance enjoined distribution of the book through commercial channels during the pendency of the action (A6). The Appellate Division of the Supreme Court modified the injunction to prohibit all distribution of the book during the pendency of the action, and made provision in its order for an early trial. The Court determined that the Patient stated good causes of action under New York law for breach of the

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[1] Numbers following the letter "A" in parentheses refer to the pages of the Appendices attached to the Petition for Certiorari.

confidential relationship between a patient and her doctor, and for invasion of the right of privacy (A3).[2] In the circumstances, the Court held, a preliminary injunction was not an invalid prior restraint upon publication (A2). The Court of Appeals of New York unanimously affirmed the order of the Appellate Division without opinion.

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[2] The lower courts did not, as stated at p. 11, n. 9 of the Petition, "recognize that there is no common law cause of action in New York for breach of doctor-patient confidential relationship." See the opinion of the Appellate Division (A3).

ARGUMENT

POINT I

THE PETITION FOR CERTIORARI SHOULD BE DENIED, FOR THE STATE COURT DID NOT DECIDE A SUBSTANTIAL FEDERAL QUESTION. THE UNAUTHORIZED DISCLOSURE OF PRIVILEGED COMMUNICATIONS BETWEEN A PATIENT AND PSYCHIATRIST IS PROHIBITED BY STATE LAW. THE FIRST AMENDMENT DOES NOT PREVENT INTERFERENCE WITH THE UNLAWFUL PUBLICATION OF A PATIENT'S SECRETS.

Doctors in New York are enjoined from divulging confidential communications of their patients by two statutes. The New York Education Law, Sections 6509-6511, and the concomitant Regulations provide that violation of the duty of secrecy is professional misconduct and ground for suspension or revocation of the doctor's license. The Regulations provide: "Unprofessional conduct

in the practice of medicine shall include *** the revealing of facts, data or information obtained in a professional capacity relating to a patient or his records without first obtaining consent of the patient or his duly authorized representative, except if duly required by a court of competent jurisdiction or statute." New York Code of Rules and Regulations, vol. 8, Section 60.1.

The New York Civil Practice Law and Rules, Section 4504(a), provides:

> "Unless the patient waives the privilege, a person authorized to practice medicine *** shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

This Court repeatedly stated in the decisions cited in the Petition for Certiorari, that all restraints upon publication do not

infringe the constitutional guarantee of freedom of the press. In the leading case on the subject of prior restraint on which Petitioners rely (pp. 7, 9-10 of the Petition), Near v. Minnesota, 283 U.S. 697, 716, the Court expressly refused to restrict judicial authority "to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."

The phrase "prior restraint" is not a "self-wielding sword", — it cannot serve as a "talismanic test" of the validity of an injunction. Kingsley Books v. Brown, 354 U.S. 436, 441. In Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-419 (cited at pp. 8, 13-14 of the Petition), the Court emphasized that the injunction it held invalid did not, and was not intended to, "redress

alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." In Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 390 (in which the Court sustained a municipal ordinance forbidding publication of help-wanted advertisements classified according to sex), the Court, in discussing Near v. Minnesota, noted that it "has never held that all injunctions are impermissible."

See also United States v. Thirty-Seven Photographs, 402 U.S. 363; United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063; and Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481. In Feeney v. Young, a doctor's public exhibition of a film showing his patient in childbirth was held actionable, despite the

patient's consent to the showing of the film to medical societies. Mr. Justice Harlan suggested in his separate opinion in Time, Inc. v. Hill, 385 U.S. 374, 404, that the matters disclosed to the public in Feeney v. Young were "so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication." And see Clayman v. Bernstein, 38 Pa. D & C 543, 550.

There is not, as Chief Judge Fuld observed in Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 347-348, "an unbounded freedom to publish whatever *** may have (been) said in private conversation. *** There is necessarily, and within suitably defined areas, a *** freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative

aspect."[3] There is no reference in the Petition for Certiorari to any decision of this Court, or of any other, suggesting that the injunctive order in this case abridges the freedoms guaranteed by the First Amendment. A court of equity, to protect private rights such as those asserted by the Patient in this case, clearly has power to restrain unauthorized disclosure of privileged information in advance of trial.

POINT II

THE ORDER OF THE NEW YORK COURT OF APPEALS IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. SECTION 1257.

The Petitioners maintain that

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[3] Emphasis in original, matter in parentheses added.

jurisdiction to review the order of the state court is conferred upon this Court by the statute 28 U.S.C. Section 1257(3) (Petition for Certiorari at pp. 2, 13-16). That section provides that "final judgments or decrees rendered by the highest court of a State *** may be reviewed by the Supreme Court ***." There can be little question that the order of the New York Court of Appeals that Petitioners seek to review, is not a final, but an interlocutory, decree.

As used in the statutes defining appellate jurisdiction: "*** a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." St. Louis I.M. & S. Ry. Co. v.

Southern Express Co., 108 U.S. 24, 28. In Cobbledick v. United States, 309 U.S. 323, Mr. Justice Frankfurter wrote for the Court at p. 326:

> "In thus denying to the appellate courts the power to review rulings at nisi prius, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality — the idea underlying 'final judgments and decrees' *** is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system ***"

There are a few instances in which the Court agreed to review the determination of a state court that was interlocutory in form, but decisive of the cause. In Organization for a Better Austin v. Keefe, 402 U.S. 415, for example, the Court vacated a temporary injunction forbidding petitioners from distributing "literature of any kind"

[402 U.S., note at p.418, and p.419]. However the petitioners in Keefe apparently did not have any legal or factual defenses to the action against them for a permanent injunction, other than the First Amendment arguments they presented to this Court.[4] Further proceedings against them in the Illinois court were likely to be "little more than a formality". Even in that case the Court expressed doubt with respect to its jurisdiction [402 U.S., note at p.418].

The Petitioners in this action, which includes a cause for money damages that has not yet been passed upon, do not maintain that this Court's decision would, at this stage of the case, determine the issues between the parties. Petitioners insist that there are

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[4] See Mr. Justice Harlan's dissenting opinion in Keefe, 402 U.S. at p.421.

"unsettled questions of state law" and "hotly contested" issues of fact still to be resolved by the New York courts (Petition at pp. 10-12). Even if the Court were to accept jurisdiction and vacate the interlocutory order, a trial of the issues between the parties would be required. Petitioners have been granted an early trial (A3) and state that they intend to "vigorously litigate" the issues in the case in the trial court and in the New York appellate courts in the event of a decision adverse to them (Petition at pp. 5, 11). It is apparent that this case is not, in any sense, a "final judgment or decree", terminating the litigation between the parties on the merits.

CONCLUSION

FOR THE REASONS OUTLINED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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